Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

RONALD E. BYERS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), rule of weighing common law factors to determine whether a worker is an independent contractor or an employee apply to worker classification determinations arising in federal income tax cases?

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In The Supreme Court of the United States

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RONALD E. BYERS,

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COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Ronald E. Byers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (App., *infra*, 3a) is unofficially reported at 104 A.F.T.R. 2d 2009-7275. The opinion of the Tax Court (App., *infra*, 4a-19a) is unofficially reported at 2007 RIA TC Memo. 2007-331, and its decision is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 10, 2009 (App.,*infra,* 2a.). A timely petition for rehearing was denied on January 21, 2010 (App., *infra,* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes and regulations are set forth in an appendix to the petition at 20a-24a.

STATEMENT

This case involves the method a court must employ in federal income tax cases to determine a worker's classification as either an independent contractor or an employee.

This Court has stated that in determining whether a worker is an independent contractor or an employee, the applicable common law factors must be both "assessed and weighed." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

Here, nine (9) common law factors were assessed and tallied, but were not weighed. The Eighth Circuit rejected Mr. Byers' argument that he was an employee and adjudged him an independent contractor by a 5-3-1 factors point score.

For the reasons set forth herein, the most appropriate course is for the Court to grant this petition, vacate the court of appeals' judgment, and

remand the case with instructions to apply the common law factors weighing rule required by *Nationwide Mut. Ins. Co. v. Darden, supra.*

Relevant Facts:

In June 1999 petitioner Ronald E. Byers was a newly licensed commercial truck driver. App., *infra,* 5a. He had neither a truck nor any special skills. App., *infra,* 6a, 17a. Seeking work, Mr. Byers responded to an advertisement for truck drivers placed by Edina Couriers, LLC, a Minneapolis, Minnesota, based pick-up and delivery service. App., *infra,* 5a.

On June 9, 1999, Mr. Byers signed an Edina Couriers' "Contractor Operating Agreement." App., *infra,* 5a. That document labeled Mr. Byers as an "independent contractor" who served Edina Couriers' customers. App., *infra,* 5a, 7a-8a. The "Contractor Operating Agreement" provided that Edina Couriers would pay Mr. Byers, semi-monthly, a 70% commission on whatever amounts that Edina Couriers determined it would charge its customers for Mr. Byers' services. App., *infra,* 5a.

Subsequently, Mr. Byers secured a truck to drive by signing a truck "lease agreement" with Conrad Companies, Inc. App., *infra,* 6a-7a. Edina Couriers and Conrad Companies were related companies. App., *infra,* 6a. Mr. Byers' truck "lease agreement" with Conrad Companies expressly linked the amounts of Mr. Byers' "truck lease payments" to the amounts that Edina Couriers paid to Mr. Byers, App., *infra,* 7a, 15a-16a. In turn, Edina Couriers deducted and withheld "truck lease payment"

amounts from the semi-monthly amounts that Edina Couriers owed to Mr. Byers. App., *infra*, 8a.

For six consecutive years, Mr. Byers performed truck driving services exclusively for Edina Couriers. App., *infra*, 9a, 16a. Edina Couriers paid Mr. Byers regardless of whether its own customers paid for Mr. Byers' services. App., *infra*, 6a-7a, 15a-16a. Edina Couriers treated Mr. Byers as an independent contractor by filing with the Commissioner of Internal Revenue Forms 1099 for 1999-2002, inclusive, and reporting that Mr. Byers had earned substantial amounts of "non-employee compensation." App., *infra*, 9a.

In a statutory notice of deficiency, the Commissioner of Internal Revenue determined that Mr. Byers had significant unpaid income tax deficiencies for the tax years 1999-2002, inclusive. App., *infra*, 4a-5a. The Commissioner's determinations included claims that Mr. Byers was liable for federal self-employment taxes because Mr. Byers had been an independent contractor truck driver. App., *infra*, 10a.

U.S. Tax Court Proceedings:

Mr. Byers petitioned the United States Tax Court to dispute the Commissioner's deficiency determinations. App., *infra*, 3a. The Tax Court had jurisdiction over Mr. Byers' petition under authority of 26 U.S.C. § 6213(a).

In the Tax Court, Mr. Byers argued that the facts and circumstances of his day-to-day working relationship with Edina Couriers demonstrated that

he was not liable for self-employment taxes because he was an Edina Couriers employee under any common law or economic reality test. App., *infra*, 12a, 17a.

In determining whether Mr. Byers was an independent contractor or an employee for federal income tax purposes, the Tax Court assessed nine (9) worker classification factors. App., *infra*, 14a-15a. The Tax Court found one (1) factor neutral, three (3) factors indicating that Mr. Byers was an Edina Couriers employee, and a majority of five (5) factors indicating that Mr. Byers was an independent contractor. App., *infra*, 17a.

The Tax Court then tallied the factors and concluded that Mr. Byers was properly classified as an independent contractor because of the resulting 5-3-1 point score. App., *infra*, 17a. The Tax Court did not weigh any of the nine factors it had assessed. App., *infra*, 14a-17a.

The Tax Court entered its decision sustaining the entirety of the Commissioner's deficiency determinations on November 13, 2007. On January 13, 2008, the Tax Court denied Mr. Byers' timely motion to vacate that decision.

Court of Appeals Proceedings:

Mr. Byers timely appealed the Tax Court's adverse decision to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals had jurisdiction to hear Mr. Byers' appeal under authority of 26 U.S.C. § 7482(a)(1).

The Court of Appeals, in a summary *per curiam* and unpublished opinion, affirmed the Tax Court's decision. App., *infra,* 3a. Subsequently, Mr. Byers filed a timely petition for both panel rehearing and for *en banc* rehearing. The Court of Appeals summarily denied the rehearing petition. App., *infra,* 1a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals erred when it approved a worker classification determination that (1) merely tallied the factors indicating whether a worker was an independent contractor or an employee and (2) concluded the worker's classification solely on the resulting point score.

The Eighth Circuit's decision conflicts with this Court's precedents in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), and *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968). These precedents require a court making a worker classification determination to assess all relevant factors and then to "weigh" them.

Had the *Darden* weighing rule been applied to the assessed common law factors in this case, the resulting worker classification determination would have been employee, not independent contractor.

Moreover, the Eighth Circuit's decision creates an intra-circuit conflict with Eighth Circuit authority in *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480 (8th Cir. 2000) and in *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486 (8th Cir. 2003). These

Eighth Circuit authorities explicitly proscribe the concluding of a worker's classification on a common law factors tally and a point score.

Additionally, the Eighth Circuit's decision creates inter-circuit conflicts with District of Columbia Circuit authority in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), and with Second Circuit authority in *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir 1992). These DC Circuit and Second Circuit authorities vigorously condemn determining a worker's classification by a common law factors tally and a point score.

Furthermore, the question presented here raises an issue of exceptional national importance.

Correct classification of the nation's workers is essential to a properly functioning federal tax system. It is axiomatic that only the parties properly liable for employment taxes should pay them. Liability for employment taxes, however, cannot depend on which federal judicial circuit the party lives, works, or conducts business in.

The method used to determine whether a worker is properly an independent contractor or an employee for federal income tax purposes must be uniform throughout the United States. Otherwise, the U.S. Treasury's certain and predictable assessment and collection of billions of dollars in federal employment taxes is jeopardized.

For those reasons, the Eighth Circuit Court of Appeals' decision warrants further review.

This Court need not, however, exercise plenary review.

The most appropriate course is for the Court to grant this petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to apply the *Darden* common law factors weighing rule.

I. THE EIGHTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPROVED A WORKER CLASSIFICATION DETERMINATION METHOD THAT CONFLICTS WITH THIS COURT'S RULE SET FORTH IN *DARDEN* AND *UNITED INS. CO.*

Darden And *United Ins. Co.* Require That Assessed Worker Classification Factors Be Weighed Rather Than Simply Tallied

The Eighth Circuit approved a worker classification determination method here that irreconcilably conflicts with a rule this Court has announced twice.

Mr. Byers was adjudged an "independent contractor" truck driver merely because a majority of five of nine worker classification factors so indicated. Yet a court's use of a tally and point score method flouts this Court's rule for worker classification set forth in both *Darden* and *United Ins. Co.*, *supra*.

In *Darden*, this Court expressly stated that the relevant common law factors must be "weighed." *Id.*

at 324. The *Darden* Court was not, however, laying down a new rule. Indeed, it was approvingly citing and quoting the then 24 year old *United Ins. Co.* rule. The Court described a worker classification determination as containing:

"...no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden* at 324 (quoting *United Ins. Co.* at 258] [Emphasis supplied].

At least two self-evident and sound policy reasons exist for the *Darden* worker classification common law factors weighing rule.

First, some relevant common law factors will have more significance to the worker's relationship than will other relevant common law factors. It is reasonable in a worker classification determination, then, for the more significant factors to carry greater weight than the relatively insignificant factors. Weighing all the relevant factors ensures accuracy in the worker's classification.

Unfortunately, the Eighth Circuit's failure to weigh the common law factors here leaves unanswered a question posed by *Darden* and *United Ins. Co.*, *viz*:

Are the five factors indicating Mr. Byers was an independent contractor outweighed by the three factors indicating he was an employee?

If the answer to the question above is yes, as Mr. Byers has argued, then Mr. Byers' classification as an independent contractor is erroneous as he is actually an employee.

Second, weighing the worker classification factors prevents any one fact or circumstance in the working relationship from disproportionately impacting more than one factor.

The Eighth Circuit's affirmation of a mere tally of the nine common law factors here allowed Conrad Companies' truck "lease payments" to control the outcome of three of those nine factors:

(1) Investment in Work Facilities and Tools Factor

"Because [Mr. Byers] was required to own or lease his own truck...he made a significant investment in his truck driving activity... *This factor indicates an independent contractor relationship.*" [Emphasis supplied]. App., *infra*, 15a;

(2) Opportunity for Profit and Loss Factor

"Because [Mr. Byers] provided and paid for the truck [he] risked a net loss if his profits [*sic*] did not exceed his expenses. *This factor indicates an independent contractor relationship.*" [Emphasis supplied]. App., *infra*, 15a;

(3) Substantial Costs Incurred Factor

"[Mr. Byers] incurred substantial costs (i.e. 55 percent of reported gross earnings) which allowed

[him] to make deliveries to and from [Edina Couriers'] customers. *This factor indicates an independent contractor relationship.*" [Emphasis supplied]. App., *infra*, 17a.

That the outcome of one-third of tallied worker classification factors can be controlled by only one aspect of a working relationship amply demonstrates the wisdom behind the *Darden* common law factors weighing rule.

The Eighth Circuit did not inquire whether the factors indicating that Mr. Byers was an independent contractor were outweighed by the factors indicating that he was an employee. Accordingly, the case should be remanded so that Mr. Byers' worker classification, and his liability for federal self-employment taxes, if any, can be determined after application of the *Darden* weighing rule.

II. THE WORKER CLASSIFICATION DETERMINATION METHOD APPROVED BY THE EIGHTH CIRCUIT IN THIS CASE CONFLICTS WITH ITS OWN AUTHORITIES AND WITH OTHER FEDERAL CIRCUIT COURT OF APPEALS' AUTHORITIES

A. The Eighth Circuit Has Expressly Rejected The "Tally And Point Score" Method Of Worker Classification

The Eighth Circuit's affirmation of a "tally and point score" worker classification method not only is at odds with this Court's authorities in *Darden* and *United Ins. Co.*, it is contrary to the Eighth Circuit's own authorities.

In unmistakable language, the Eighth Circuit has twice expressly rejected the worker classification method that it approved in this case; in at least two other cases, it has explicitly recognized the viability of this Court's common law factors weighing rule.

Before it decided this case to the contrary, the Eighth Circuit stated that determining whether a worker is an independent contractor or an employee:

"...requires more than simply tallying factors on each side and selecting the winner on the basis of a point score." *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 487 (8th Cir. 2000).

Three years after it decided *Schwieger*, the Eighth Circuit had another opportunity to decide a worker classification matter. Once more, the Eighth Circuit unquestioningly renounced any notion that it could simply count the factors favoring an independent contractor status, then count the factors favoring an employee status, and thus arrive at the worker's correct classification:

"Our inquiry . . . 'requires more than simply tallying factors on each side and selecting the winner on the basis of a point score.'" *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 489 (8th Cir. 2003), quoting *Schwieger, supra*, at 487.

The *Lerohl* and *Schwieger* courts' express rejection of the "tally and point score" method of classifying workers was an outgrowth of Eighth Circuit precedent that carefully followed the *Darden*

and *United Ins. Co.* common law factors weighing rule:

"The Supreme Court in *Darden* noted a number of factors to be considered in applying the common law agency test, stressing that 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Alford v. United States*, 116 F.3d 334, 337 (8th Cir. 1997), quoting *Darden* at 324 (internal citations omitted) [emphasis supplied].

Even before *Darden*, the Eighth Circuit recognized that it was required to apply the then *United Ins. Co.* common law factors weighing rule when it opined in another of its worker classification determinations:

"[T]he weight given to any single factor can vary depending upon the other relevant factors involved in a case." *Short v. Central States*, 729 F.2d 567, 571 (8th Cir. 1984).

Mystifyingly, in deciding the worker classification question at issue here, the Eighth Circuit ignored both this Court's rule and its own authorities. Indeed, this could be an isolated case and thus Mr. Byers must simply chalk up his fate to bad luck. Yet this Court hasn't expressly laid down the *Darden/United Ins. Co.* common law factor weighing rule in a federal income tax case. It should do so in this case.

B. The "Tally And Point Score" Worker Classification Method Affirmed By The Eighth Circuit In This Case Has Been Condemned By The District Of Columbia Circuit And By The Second Circuit

In addition to its having been expressly rejected by the Eighth Circuit in other cases, the "tally and point score" worker classification method has been vigorously condemned by at least two other federal circuit courts of appeals.

While the Eighth Circuit was considering this case, its sister circuit in the District of Columbia was deciding a worker classification case that also involved truck drivers. As the Eighth Circuit had done in both *Lerohl* and *Schwieger*, *supra*, the DC Circuit went well beyond simply acknowledging the viability of the *Darden* common law factor weighing rule. In fact, it derided the methodology that the Eighth Circuit later affirmed here:

"The common law test, after all, is not merely quantitative. We do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins." *FedEx Home Delivery v. NLRB*, 563 F.3d 492 [fn.3] (D.C. Cir. 2009).

Several years prior to the Eighth Circuit's and the DC Circuit's respective disparagements of the "tally and point score" worker classification method, the Second Circuit had addressed that method and soundly denounced it:

"[I]n the instant case the district court gave each factor equal weight and simply counted the number of factors for each side in determining that Aymes was an employee...[t]he factors should not merely be tallied but should be weighed according to their significance in the case." [footnote omitted.] *Aymes v. Bonelli*, 980 F.2d 857, 861(2d Cir 1992).

Thus, the Eighth Circuit affirmed the Tax Court's conclusion that Mr. Byers was an independent contractor truck driver for the very reasons that both the District of Columbia Circuit and the Second Circuit unmistakably condemn, i.e. that the Tax Court...

"...just count[ed] the factors that favor[ed] one camp, and those the other, and declare[d] that whichever side score[d] the most points wins." *FedEx Home Delivery, supra*, and

"...gave each factor equal weight and simply counted the number of factors for each side." *Aymes, supra*.

To summarize, the Eighth Circuit's decision to acquiesce in a "tally and point score" worker classification method here irreconcilably conflicts with:

(1) this Court's rule in *Darden* and *United Ins.* Co., *supra*;

(2) its own Eighth Circuit authorities in *Lerohl* and *Schwieger*, *supra*;

(3) the District of Columbia Circuit's opinion in *FedEx Home Delivery, supra*; and

(4) the Second Circuit's opinion in *Aymes, supra*.

In view of this overwhelming authority, this Court should permit the Eighth Circuit an opportunity to bring itself in line with it by granting this petition and by remanding this case for further proceedings.

III. THE UNITED STATES GOVERNMENT'S ABILITY TO CORRECTLY ASSESS AND COLLECT FEDERAL EMPLOYMENT TAXES FROM THE PROPERLY LIABLE PARTIES ARISES FROM THE QUESTION PRESENTED AND IS OF EXCEPTIONAL NATIONAL IMPORTANCE

To Prevent The Same Class Of Workers From Being Classified, And Thus Taxed, Differently, The *Darden* Common Law Factors Weighing Rule Should Be Conclusively Applied In Federal Income Tax Cases

The *Darden* Court had no reservations about adapting the then *United Ins. Co.* common law factors weighing rule from a labor relations case to an ERISA case. Likewise, to further the uniformity of worker classification determinations, this Court should conclusively apply the now *Darden* common law factors weighing rule to federal income tax cases.

A danger exists in permitting the *Darden* rule to apply to federal income tax cases only by implication, namely that a court could neglect to apply it, as the Eighth Circuit did here, or even decline to apply it. Yet if the trial and appellate courts in federal income tax cases may treat the *Darden* rule as merely persuasive authority, identical classes of workers could be classified, and thus taxed, very differently.

For instance, consider what would happen if one court of appeals weighs the worker classification factors it considers, while another court of appeals merely tallies the worker classification factors it considers:

On one hand, truck drivers working for Company A, but living within the federal judicial circuit that weighs its worker classification factors, could be classified as company employees and thus found not liable to pay federal self-employment taxes.

On the other hand, other truck drivers working for the same Company A, but living within the federal judicial circuit that merely tallies and "point scores" its worker classification factors, could be classified as independent contractors and thus found liable to pay federal self-employment taxes.

The Congress could never have intended such an absurd result.

The U.S. Government, in the person of the Commissioner of Internal Revenue, has a vital interest in establishing certainty and predictability in the assessment and collection of its federal

employment taxes. This would be difficult for it to accomplish if, using the example above, a national trucking company's drivers are the parties liable to pay federal employment taxes in one federal judicial circuit, but the national trucking company itself is the party liable to pay federal employment taxes with respect to its drivers in another federal judicial circuit.

If each federal court may determine for itself whether to apply the *Darden* common law factors weighing rule in a federal income tax case, confusion will ensue and tax litigation will multiply. This Court, then, should remove all doubt and use this case as its vehicle to conclusively apply the *Darden* weighing rule to all federal income tax cases.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to apply the common law factors weighing rule laid down by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted,

April 17, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-2016

Ronald E. Byers,
Appellant

v.

Commissioner of Internal Revenue,
Appellee

Appeal from Tax Court, Internal Revenue Service
(11606-05)

ORDER

The petition for rehearing en banc is denied.
The petition for rehearing by the panel is also denied.

January 21, 2010

Order Entered at the Direction of the Court:
Clerk, U. S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-2016

Ronald E. Byers,
Appellant

v.

Commissioner of Internal Revenue,
Appellee

Appeal from Tax Court, Internal Revenue Service
(11606-05)

JUDGMENT

This appeal from the United States Tax Court was submitted on the record of the tax court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the tax court in this cause is affirmed in accordance with the opinion of this Court.

November 10, 2009

Order Entered in Accordance with Opinion:
Clerk, U. S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-2016

Ronald E. Byers,	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	Tax Court
	*	
Commissioner of Internal Revenue,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: October 2, 2009
Filed: November 10, 2009

Before MURPHY, COLLOTON, and SHEPHERD, Circuit Judges.

PER CURIAM.

Ronald Byers challenges the tax court's[1] decision, after a bench trial, upholding the IRS's determination of his taxable income for tax years 1999-2002. Following careful review, see Campbell v. Comm'r, 164 F.3d 1140, 1142 (8th Cir. 1999) (standard of review for tax court decisions), we affirm the decision for the reasons stated in the tax court's memorandum. See 8th Cir. R. 47B.

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[1] The Honorable Stephen J. Swift, United States Tax Court Judge.

APPENDIX D

T.C. Memo. 2007-331

UNITED STATES TAX COURT

RONALD E. BYERS, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 11606-05. Filed November 5, 2007.

Ronald E. Byers, pro se.

Kristin M. Timmons, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SWIFT, Judge: Respondent determined deficiencies in petitioner's Federal income and self-employment taxes and additions to tax as follows:

		Additions to Tax	
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6654
1999	$ 7,921	$ 1,980	$ 12
2000	25,179	6,294	1,344
2001	13,601	3,400	543
2002	11,571	2,892	386

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

The primary issues for decision are the amount of petitioner's 1999, 2000, 2001, and 2002 income, whether petitioner is liable for self-employment taxes on the income, and whether petitioner is liable for the additions to tax determined by respondent.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. At the time the petition was filed, petitioner resided in Wayzata, Minnesota.

In 1999, petitioner applied for and received a commercial driver's license. Shortly thereafter, petitioner answered an advertisement placed by Edina Couriers, Inc. (ECI), for truck drivers.

ECI operated a delivery service based in Minneapolis, Minnesota, offering deliveries by bicycle, car, and truck.

On June 9, 1999, petitioner entered into a written "Contractor Operating Agreement" (operating agreement) with ECI under which petitioner agreed to be a truck driver for ECI, picking up and delivering goods to and from ECI customers. For his services, petitioner was to be paid by ECI 70 percent of the gross amounts ECI billed its customers relating to deliveries made by petitioner.

As ECI received orders from customers, ECI used a dispatch center to coordinate and to assign to the truck drivers the pickups and deliveries. Truck drivers who wished to work on a particular day reported to ECI's dispatch center their availability--usually for approximately 10 hours at a time. Throughout the day, truck drivers kept in contact with the ECI dispatch center using cell phones and pagers.

Usually, truck drivers determined for

themselves which routes to take and in what order to make pickups and deliveries for ECI.

As indicated, because ECI truck drivers[1] were not paid a set wage but rather a percentage of the gross dollar amounts ECI billed its customers, each day ECI truck drivers earned more the more deliveries they made.

ECI truck drivers did not bill ECI's customers, did not receive payments from customers, and did not involve themselves in collection problems when customers failed to pay ECI for deliveries.

Under the operating agreements, truck drivers could terminate their contract with ECI with 30 days' notice. In practice, ECI allowed truck drivers to quit immediately without giving advance notice.

Truck drivers with ECI did not accrue paid sick or vacation leave or health or pension benefits.

Under the ECI operating agreements, truck drivers were not precluded from making deliveries for companies other than ECI, and typically truck drivers at their discretion could choose to work or not work on any particular day without affecting their status with ECI.

ECI did not provide trucks for the truck drivers to make deliveries. Most of the ECI truck drivers owned their own trucks outright or leased trucks through a company not related to ECI. However, some truck drivers, including petitioner, leased trucks from Conrad Companies, Inc. (CCI), a company related to ECI. Also, truck drivers could lease from CCI cell phones and pagers and could

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[1] References herein to ECI truck drivers is for convenience only and is not intended to suggest an employment relationship between Edina Couriers, Inc. (ECI), and the truck drivers.

purchase from ECI work clothes.

Whether the trucks were owned or leased by the drivers, ECI did not pay the truck drivers for fuel, insurance, or maintenance costs of the trucks. If truck drivers leased trucks from CCI to make deliveries, CCI provided tools and other equipment (such as pallet jacks) for the purpose of making ECI deliveries, and CCI also paid the fuel, insurance, and maintenance costs for the leased trucks. In return, the truck drivers who leased trucks from CCI owed CCI monthly lease payments on the trucks equal to approximately 55 percent of the amounts ECI owed the truck drivers for deliveries.

Under a typical lease agreement with CCI, a particular CCI truck might be used by different truck drivers within a 24-hour period.

Generally, trucks leased from CCI were required to be parked overnight on ECI property, and trucks owned by the truck drivers and trucks leased by the truck drivers from a company other than CCI were not to be parked overnight on ECI property.

ECI treated the truck drivers, including petitioner, as independent contractors. The June 9, 1999, operating agreement that petitioner entered into with ECI referred to petitioner as an independent contractor. For example, clause nine of the operating agreement provided as follows:

> 9. Independent Contractor Relationship. [Petitioner] agrees and understands that the relationship created by this Agreement between himself and ECI is solely one wherein [petitioner] * * * is an independent contractor and that [petitioner] * * * or any drivers furnished pursuant to the terms hereof will not be employees of ECI.

> [Petitioner] * * * agrees to be responsible for any wages due said drivers, the withholding or any taxes, social security payments or other similar salary deductions. * * *

During the years in issue, twice a month petitioner received settlement reports from ECI reflecting petitioner's gross earnings. The settlement reports also reflected deductions for the truck lease payments petitioner owed to CCI that were deducted from petitioner's ECI earnings and remitted by ECI to CCI.

During some of the years in issue, petitioner also oversaw CCI vehicles parked overnight on ECI's property, and petitioner, at ECI's request, provided training to new truck drivers. For these services, petitioner received additional earnings from CCI and from ECI, respectively.

During the years in issue, petitioner maintained in his own name two credit card accounts and one personal bank line of credit, and petitioner maintained in his own name and in the name of his wife Deanna L. Byers a joint personal checking account.[2]

Neither ECI nor CCI ever withheld from petitioner's earnings Federal or State income or employment taxes, and no deduction for Federal or State income tax withholding was ever shown on the settlement reports that petitioner received from ECI.

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[2] One of petitioner's credit cards indicates a payment to "We the People", a tax protester organization discussed in United States v. Simkanin, 420 F.3d 397, 400-401 (5th Cir. 2005), and in United States v. Schulz, 100 AFTR 2d 2007-5538, 2007-2 USTC par. 50,619 (N.D.N.Y. 2007).

For each year in issue, ECI submitted to respondent and to petitioner Forms 1099-MISC, Miscellaneous Income, reflecting for each year petitioner's cumulative gross earnings that ECI had reflected on the settlement reports for each year and not reflecting earnings petitioner received for training truck drivers.

None of the earnings petitioner received from ECI were reported to respondent on a Form W-2, Wage and Tax Statement.

CCI did not submit to respondent or to petitioner Forms 1099 relating to petitioner's compensation for oversight of CCI vehicles.

For the years in issue, petitioner's annual gross earnings from driving trucks as reflected on the Forms 1099 ECI submitted, the amounts deducted by ECI and remitted to CCI for truck lease payments, and the difference between the two are as follows:

Year	Gross Earnings	Truck Lease Payments	Difference
1999	$49,814	$25,900	$22,914
2000	97,984	52,911	45,073
2001	85,163	46,029	39,134
2002	84,667	45,961	38,706

During the years in issue, petitioner never requested from ECI a Form W-2, and petitioner never objected to ECI's use of Forms 1099 to report to respondent petitioner's gross earnings.

For 1999 through 2002, petitioner did not make estimated Federal income tax payments to respondent, and petitioner did not file Federal income

tax returns.

On audit, respondent treated petitioner as an independent contractor of ECI, determined petitioner's income and deductions relating to petitioner's truck driving activity, and determined petitioner's taxable income and petitioner's income and self-employment taxes.

In respondent's determination of petitioner's income, respondent utilized the Forms 1099 ECI had submitted, and respondent allowed business expense deductions for petitioner's truck lease payments to CCI. Respondent also analyzed petitioner's bank accounts and concluded that significant additional unexplained funds had been deposited into petitioner's bank account, which unexplained funds respondent treated as additional taxable income relating to petitioner's work for ECI and CCI. Petitioner's taxable income as determined by respondent is set forth below:

Year	Respondent's Determination of Petitioner's Taxable Income
1999	$31,129
2000	73,650
2001	46,804
2002	42,171

Respondent treated petitioner as married filing separately, allowed petitioner a standard deduction, and respondent determined the tax deficiencies (which includes self-employment taxes) and the additions to tax at issue herein.

OPINION

Section 61(a) defines gross income as "all income from whatever source derived," including earnings for services and gross income derived from business. Sec. 61(a)(1) and (2).

Generally, taxpayers who receive income in a year equal to or in excess of the exemption amount (i.e., $2,000 as adjusted for inflation for 1999, 2000, 2001, and 2002) are required to file Federal income tax returns. Secs. 151(d) and 6012(a)(1)(A), (D) (ii) .

Petitioner agrees that he received income in amounts of at least $22,914, $45,073, $39,134, and $38,706 respectively for 1999, 2000, 2001, and 2002 (the amounts shown on the Forms 1099 less the truck lease payments), amounts far in excess of the exemption amount.[3]

Petitioner has not shown that the bank deposits charged to petitioner by respondent as additional income for the years in issue represented nontaxable income. See Ellis v. Commissioner, T.C. Memo. 2007-207. We sustain respondent's determination of petitioner's taxable income for 1999 through 2002,

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[3] At a recent Minnesota Tax Court trial to determine petitioner's liability to pay 2000 and 2001 Minnesota income taxes, petitioner refused to testify under oath and argued that he had not received from ECI any earnings in 2000 and 2001. The Minnesota Tax Court found petitioner liable for State income tax for 2000 and 2001 based on income from petitioner's truck driving activity with ECI. See generally Byers v. Commissioner, 2006 WL2380586 (Minn. Tax Reg. Div. Aug. 14, 2006), amended on rehg. 2006 WL3155401 (Minn. Tax Reg. Div. Nov. 2, 2006), and affd. 735 N.W.2d 671 (Minn. 2007).

and we conclude that petitioner was required to file Federal income tax returns for 1999 through 2002 and to pay Federal income taxes.

Petitioner argues that he was an employee of ECI, that under section 3402(a)(1) employers are required to withhold Federal income taxes from employee wages, and that ECI rather than he should be held liable for payment to respondent of petitioner's unpaid Federal income and employment taxes.

However, an employer's failure to withhold from employee wages Federal income taxes does not extinguish an individual taxpayer's requirement to report income and to pay to respondent Federal income taxes. See Church v. Commissioner, 810 F.2d 19, 20 (2d Cir. 1987); Latos v. Commissioner, T.C. Memo. 2007-265; Kuntz v. Commissioner, T.C. Memo. 1962-98; see also Ravelo Escandon v. Commissioner, T.C. Memo. 2007-128 (an employer's misclassification of an employee as an independent contractor does not reduce or discharge the employee's liability to pay Federal income taxes). Further, there is no withholding requirement under section 3402 for payors of independent contractors.

Petitioner argues that amounts ECI deducted from petitioner's gross earnings as petitioner's truck lease payments and remitted to CCI should be recharacterized as Federal income tax withholdings and that respondent should credit the funds remitted by ECI to CCI against petitioner's Federal income and self-employment taxes for the years in issue.

Set forth below for each year in issue is a comparison of petitioner's truck lease payments remitted to CCI and the tax deficiencies respondent determined against petitioner:

Year	Truck Lease Payments	Tax Deficiencies
1999	$25,900	$ 7,921
2000	52,911	25,179
2001	46,029	13,601
2002	45,961	11,571

Based on the above, petitioner argues that he owes no tax deficiencies and that respondent owes him a refund of overpaid Federal taxes for each year in the amount of the above positive difference between the truck lease payments (that petitioner now requests be treated as tax payments) and the tax deficiencies.

An individual taxpayer, however, is not entitled to a section 31 credit toward Federal income and employment taxes for taxes not actually withheld from the individual's earnings. See United States v. Kuntz, 259 F.2d 871, 872 (2d Cir. 1958); Edwards v. Commissioner, 39 T.C. 78, 83-84 (1962), affd. on this issue 323 F.2d 751 (9th Cir. 1963).

Herein, no Federal income and self-employment taxes were withheld from petitioner's earnings, and petitioner has not cited any authority that would authorize us now to recharacterize truck lease payments to CCI as Federal income and self-employment taxes withheld from petitioner's earnings.

Petitioner's liability for self-employment taxes for the years in issue turns on whether petitioner's relationship with ECI constituted an independent contractor relationship (respondent's position) or an

employment relationship (petitioner's position).

Under section 1401, self-employed taxpayers, including independent contractors, are liable for a tax on self-employment income. See Jones v. Commissioner, T.C. Memo. 2007-249; Jackson v. Commissioner, 108 T.C. 130, 133-134 (1997); Allen v. Commissioner, T.C. Memo. 2005-118; Turnidge v. Commissioner, T.C. Memo. 2003-169.

Self-employment income is defined as net earnings from self-employment. Sec. 1402(b). "Net earnings from self-employment" is defined as "gross income derived by an individual from any trade or business carried on by such individual". Sec. 1402(a).

In general, services performed as an independent contractor give rise to self-employment income. See sec. 1402(c)(2) and (3); Jackson v. Commissioner, supra at 133-134.

Generally, a taxpayer who works for another but who controls the means and methods for accomplishing the work is treated as an independent contractor. Secs. 31.3121(d)-1(c)(2), 31.3306(i)-1(b), Employment Tax Regs.

In deciding whether a taxpayer is to be treated as an independent contractor or as an employee, we apply seven factors (see, e.g., Ewens & Miller, Inc. v. Commissioner, 117 T.C. 263, 270 (2001); Peno Trucking, Inc. v. Commissioner, T.C. Memo. 2007- 66; secs. 31.3121(d)-1(c)(2), 31.3306(i)-1(b), Employment Tax Regs.), as follows:

(1) Control over manner of accomplishing work;
(2) Investment in work facilities and tools;
(3) Opportunity for profit or loss;
(4) Termination of the work relationship;
(5) Participation in service

integral to regular business;

(6) Length of the relationship; and

(7) Intent of the parties as to the type of relationship formed.

The United States Court of Appeals for the Eighth Circuit, to which appeal of this case would lie, uses two additional factors, see Day v. Commissioner, T.C. Memo. 2000-375, as follows:

(8) Substantial cost incurred; and

(9) Special skills required.

We apply the factors as appropriate under the circumstances. Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992). No single factor is dispositive. Ewens & Miller, Inc. v. Commissioner, supra.

Control over Manner of Accomplishing Work

Petitioner controlled the manner in which he scheduled and made pickups and deliveries without control from ECI.

This factor indicates an independent contractor relationship.

Investment in Work Facilities and Tools

Because petitioner was required either to own or lease his own truck, tools, and other equipment, petitioner made a significant investment in his truck driving activity. Cf. Air Terminal Cab, Inc. v. United States, 478 F.2d 575, 580-581 (8th Cir. 1973).

This factor indicates an independent contractor relationship.

Opportunity for Profit or Loss

Because petitioner was paid not a fixed wage

but a percentage of gross amounts billed to customers, and because the number of deliveries petitioner made depended significantly on petitioner's efficiency, petitioner had an opportunity to participate in ECI's profits. Because petitioner provided and paid for the truck and insurance, among other things, petitioner risked a net loss if his profits did not exceed his expenses.

This factor indicates an independent contractor relationship.

Termination of the Work Relationship

Under the June 1999 operating agreement, ECI and/or petitioner were to give 30 days' notice before a termination of petitioner, but ECI had a practice of allowing truck drivers to terminate without notice, if the truck drivers so desired.

We regard this factor as neutral.

Participation in Service Integral to Regular Business

Because truck drivers were an integral part of ECI's regular delivery service, petitioner participated as a truck driver in ECI's regular business for the years in issue.

This factor indicates an employment relationship.

Length of the Relationship

Because petitioner performed delivery services for ECI for almost 6 years, petitioner had a long-term relationship with ECI.

This factor indicates an employment relationship.

Parties' Intent as to Type of Relationship Formed

The June 9, 1999, operating agreement clearly states that petitioner was to be treated as an independent contractor. Because petitioner worked for years under the operating agreement and never objected to the Forms 1099 issued by ECI, the operating agreement does not in any way support petitioner's claim that an employment relationship with ECI was intended. Further, petitioner was treated by ECI as an independent contractor (i.e., no accrued paid leave, no health or pension benefits, and no wage withholding).

This factor indicates an independent contractor relationship.

Substantial Costs Incurred

Petitioner incurred substantial costs (i.e., 55 percent of reported gross earnings) to lease a truck which allowed petitioner to make deliveries to and from ECI customers.

This factor indicates an independent contractor relationship.

Special Skills Required

Outside of the skills needed to drive trucks, ECI did not require that petitioner have special skills. See Day v. Commissioner, T.C. Memo. 2000-375. This factor indicates an employment relationship.

Of the nine factors, five factors indicate an independent contractor relationship, three factors indicate an employee relationship, and one factor is neutral.

We conclude that petitioner is to be treated as an independent contractor for the years in issue and that petitioner is liable for self-employment taxes for each year.

Petitioner refers us to Peno Trucking, Inc. v. Commissioner, T.C. Memo. 2007-66, and to Day v. Commissioner, supra. The taxpayer employers in Peno Trucking and Day exercised a significant degree of control over driver schedules, provided free-of-charge trucks (covering fuel, maintenance, and insurance costs), tools, and other equipment, and retained a right to immediately terminate drivers. Peno Trucking and Day are distinguishable from this case.

Additions to Tax

Respondent bears the burden of production in connection with additions to tax under sections 6651(a)(1) and 6654. Sec. 7491(c); Higbee v. Commissioner, 116 T.C. 438, 446 (2001).

Under section 6651(a)(1), a taxpayer who fails to file a Federal income tax return by the date due may be liable for an addition to tax unless the taxpayer demonstrates reasonable cause and not willful neglect.

Generally, a taxpayer who is required to pay but who significantly underpays estimated Federal income taxes shall be liable for an addition to tax. Sec. 6654(a).

Petitioner admits that he had no reasonable cause for his failure to file Federal income tax returns for the years in issue. We sustain respondent's determination of section 6651(a)(1) failure to file additions to tax and section 6654 estimated tax additions to tax against petitioner for 1999, 2000, 2001, and 2002.

We have considered all arguments made herein, and, to the extent not addressed, we conclude that they are without merit or are irrelevant.

To reflect the foregoing,

Decision will be entered for respondent.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

26 U.S. C. § 1401. Rate of tax

(a) **Old-age, survivors, and disability insurance**—In addition to other taxes, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax equal to the following percent of the amount of the self-employment income for such taxable year:

In the case of a taxable year

Beginning after:	*And before:*	*Percent*
December 31, 1983	January 1, 1988	11.40
December 31, 1987	January 1, 1990	12.12
December 31, 1989		12.40

(b) **Hospital insurance**—In addition to the tax imposed by the preceding subsection, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax equal to the following percent of the amount of the self-employment income for such taxable year:

In the case of a taxable year

Beginning after:	*And before:*	*Percent*
December 31, 1983	January 1, 1985	2.60
December 31, 1984	January 1, 1986	2.70
December 31, 1985		2.90

26 U.S.C. § 1402. Definitions

(a) **Net earnings from self-employment**—The term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary income or loss....

(b) **Self-employment income**—The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a nonresident alien individual, except as provided by an agreement under section 233 of the Social Security Act) during any taxable year; except that such term shall not include—

(1) in the case of the tax imposed by section 1401(a), that part of the net earnings from self-employment which is in excess of

(i) an amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective for the calendar year in which such taxable year begins, minus

(ii) the amount of the wages paid to such individual during such taxable years; or

(2) the net earnings from self-employment, if such net earnings for the taxable year are less than $400.

For purposes of paragraph (1), the term "wages" (A)

includes such remuneration paid to an employee for services included under an agreement entered into pursuant to the provisions of section 3121(l) (relating to coverage of citizens of the United States who are employees of foreign affiliates of American employers), as would be wages under section 3121(a) if such services constituted employment under section 3121(b), and (B) includes compensation which is subject to the tax imposed by section 3201 or 3211. An individual who is not a citizen of the United States but who is a resident of the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or American Samoa shall not, for purposes of this chapter be considered to be a nonresident alien individual. In the case of church employee income, the special rules of subsection (j)(2) shall apply for purposes of paragraph (2).

(c) **Trade or business**—The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that such term shall not include—

(1) the performance of the functions of a public office, other than the functions of a public office of a State or a political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis and in which such functions are not covered under an agreement entered into by such State and the Commissioner of Social Security pursuant to section 218 of the Social Security Act;

(2) the performance of service by an individual as an employee, other than—

(A) service described in section 3121(b)(14)(B)

performed by an individual who has attained the age of 18,

(B) service described in section 3121(b)(16),

(C) service described in section 3121(b)(11), (12), or (15) performed in the United States (as defined in section 3121(e)(2)) by a citizen of the United States, except service which constitutes "employment" under section 3121(y),

(D) service described in paragraph (4) of this subsection,

(E) service performed by an individual as an employee of a State or a political subdivision thereof in a position compensated solely on a fee basis with respect to fees received in any period in which such service is not covered under an agreement entered into by such State and the Commissioner of Social Security pursuant to section 218 of the Social Security Act,

(F) service described in section 3121(b)(20), and

(G) service described in section 3121(b)(8)(B);

(3) the performance of service by an individual as an employee or employee representative as defined in section 3231;

(4) the performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(5) the performance of service by an individual in the exercise of
his profession as a Christian Science practitioner; or

(6) the performance of service by an individual during the period for which an exemption under subsection (g) is effective with respect to him.

The provisions of paragraph (4) or (5) shall not apply to service (other than service performed by a member of a religious order who has taken a vow of poverty as a member of such order) performed by an individual unless an exemption under subsection (e) is effective with respect to him.

(d) **Employee and wages**—The term "employee" and the term "wages" shall have the same meaning as when used in chapter 21 (sec. 3101 and following, relating to Federal Insurance Contributions Act)....